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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1056

WILLIAM HOYET REDMOND AND DOROTHY LUCILLE REDMOND, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The Solicitor General, on behalf of the United States, respectfully moves this Court for an order granting the petition for a writ of certiorari, vacating the judgment below, and remanding the cause to the United States District Court for the Middle District of Tennessee with directions to dismiss the information. The motion is brought pursuant to the power recognized by this Court in *Petite* v. *United States*, 361 U.S. 529,[1] and is made for the reason that the instant prosecution is not in accord with the policy of the federal government as indicated below.

[1] See also *Marakar* v. *United States*, 370 U.S. 723.

214-974—66

The pertinent circumstances which give rise to this motion are as follows. Some time in March 1964, petitioners, William Hoyet Redmond and his wife, took eleven photographs of each other posing in the nude. Thereafter, they sent the undeveloped film to a firm in Havelock, North Carolina, which had advertised its willingness to develop "confidential photographs" upon payment of a membership fee and a developing charge. The payments were made and in due course the developed negatives and a print of each were mailed back to petitioners.

Petitioners were charged with violating the postal obscenity law (18 U.S.C. 1461)[2] in that they know-

[2] 18 U.S.C. 1461 provides in pertinent part:

Mailing obscene or crime-inciting matter.

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance;

* * * * *

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

ingly caused eleven obscene photographs and negatives to be delivered to them through the mail. Petitioners waived indictment and jury and were tried on an information in the District Court for the Middle District of Tennessee on October 15, 1964. By judgment entered on November 6, 1964, both were found guilty. Mr. Redmond was sentenced to a term of nine months' imprisonment and Mrs. Redmond to a term of six months. The Court of Appeals for the Sixth Circuit affirmed.

The Department of Justice has a responsibility for the control of government litigation that is not confined to avoiding legal error but extends to the formulation and implementation of appropriate prosecutorial policies. In recognition of that responsibility, we have concluded that the initiation of the instant prosecution was not in accord with policies which had previously been formulated within the Department for the guidance of United States Attorneys. For that reason, and in the interest of justice, the information should be dismissed.

The policy of the Department was set forth in a memorandum to United States Attorneys, dated August 31, 1964. That memorandum concerns the handling of obscene private correspondence cases and makes the following points which are relevant here.

> 1. The primary objective of prosecution should be to restrain the exploitation of obscene private correspondence for commercial gain, such as, by the sale or solicitation of sale of obscene materials, or by the operation of a correspondence club for paying participants.

2. The principal thrust of prosecution should be directed toward those who are the prime movers in such endeavors.

3. It is the Department's view that generally no useful purpose is served by a felony conviction of individuals who have willingly exchanged private letters, although obscene. This is not to say that prosecution may never be instituted in such cases. Rather, it is our view that prosecution should be the exception confined to those cases involving repeated offenders or other circumstances which may fairly be characterized as aggravated.

4. United States Attorneys should give careful consideration to all of the surrounding circumstances, such as, the subject's prior record, particularly with respect to his involvement with obscene materials and sex-related offenses; his employment, including his opportunity for close association with young people; and his educational level.

5. The United States Attorney should determine initially whether a stern warning and declination of prosecution is adequate in the particular case. This disposition should suffice in the routine cases of consensual, obscene private correspondence.

While the organization which developed the Redmonds' film did sponsor some sort of correspondence club, there is no indication that the Redmonds engaged in any correspondence with other members. The mere return of the developed pictures to the Redmonds involves an even smaller degree of publication, if any, than does consensual correspondence. The Redmonds were not prime movers in the organiza-

tion. They were not repeated offenders. They had no record of involvement with obscene materials or sex-related offenses and no apparent opportunity for close association with young people. No other aggravating circumstance appears to be present. Finally, we note that this prosecution was not directed at "the sordid business of pandering" recently denounced by the Court in *Ginzburg* v. *United States,* No. 42, this Term.

Upon analysis of the relevant facts, we have concluded that this case does not present circumstances which would justify a departure from the government's policy. Accordingly, pursuant to the practice recognized in *Petite* v. *United States,* 361 U.S. 529, we move the petition for a writ of certiorari be granted, the judgment of the court below be vacated, and the cause remanded to the district court with directions to dismiss the information.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

APRIL 1966.

END